Supreme Court, U.S.
FILED
06-39 JUL 7 - 2006
OFFICE OF THE CLERK

No.

IN THE

Supreme Court of the United States

IN THE MATTER OF THE ESTATE OF SAMUEL M. DAMON,
TRUST CREATED UNDER THE WILL OF SAMUEL M. DAMON,

CHRISTOPHER JAMES DAMON HAIG,
Petitioner,

v.

SHARON DAMON, ET AL.,
Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Hawaii

PETITION FOR A WRIT OF CERTIORARI

THEODORE B. OLSON
Counsel of Record
MATTHEW D. MCGILL
KRISTINA MARLOW
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue NW
Washington, DC 20036-5306
(202) 955-8500

Counsel for Petitioner

QUESTION PRESENTED

In Hawaii, as elsewhere, a will speaks from the time of the testator's death and must be interpreted in light of the laws in force at that time. When Samuel Mills Damon died in 1924, Hawaii interpreted testamentary language requiring "per stirpes" distribution in accordance with the common-law understanding recorded in the Restatement (First) of Property that provided for strict per stirpes or modified per stirpes distribution, depending upon the language of the will. Rather than apply this formulation, the Supreme Court of Hawaii applied an interpretation of "per stirpes" adapted from the Restatement (Second) of Property that effectively eliminated the possibility of a modified per stirpes distribution and radically diminished Petitioner's share in the residuary estate. It did so notwithstanding Petitioner's argument that retroactive application of the new rule violated his right to due process under the Fourteenth Amendment of the U.S. Constitution. The question presented is whether the state courts of Hawaii deprived Petitioner of his property without due process of law by retroactively altering the meaning of "per stirpes" to reduce his fully-vested interest in the corpus of the trust created by the Damon will.

PARTIES TO THE PROCEEDINGS

Before the Supreme Court of Hawaii, the appellants were: Petitioner Christopher Damon Haig, Michael E. Haig, Wendy Haig, the Estate of Joan Damon Haig, Brendan Damon Mesker, John Philip Damon, Daniel Holt, Melanie Holt, Allison Holt Gendreau, Katherine Achaval, Peter Baldwin, and Bennet Baldwin.

The appellees were: Sharon Damon; Siddhartha Damon, Shawnna Sorenson, Frank Edward Snow, Heidi Ann Snow, Julia Ann Snow, Samuel Renny Damon, Julio Damon Spee, Miles Samuel Spee, Philip Edward Spee, Pia Damon Spee.

App., *infra*, 11a-12a.

The Trustees Under the Will and of the Estate of Samuel Mills Damon, Deceased, David M. Haig, Fred C. Weyand, Walter A. Dods, Jr., and Paul M. Ganley, also entered an appearance.

TABLE OF CONTENTS

QUESTION PRESENTED i
PARTIES TO THE PROCEEDINGS ii
TABLE OF CONTENTS iii
TABLE OF AUTHORITIES iv
PETITION FOR A WRIT OF CERTIORARI 1
OPINIONS AND ORDERS BELOW 1
JURISDICTION 1
CONSTITUTIONAL PROVISION 1
STATEMENT OF THE CASE 1
REASONS FOR GRANTING THE PETITION 8
The Decision Of The Supreme Court Of Hawaii Conflicts With Several Decisions Of This Court Concerning Retroactive Application Of Law 8
CONCLUSION 12

TABLE OF AUTHORITIES

Pages

CASES

Auffm'ordt v. Rasin, 102 U.S. 620 (1880) 8, 9, 11

Bouie v. City of Columbia, 378 U.S. 347 (1964) 10, 11

Campbell v. Kawananakoa, 34 Haw. 333 (1937) 4

Dunn v. Micco, 106 F.2d 356 (10th Cir. 1939)..... 9, 10

Hamdan v. Rumsfeld, 548 U.S.__ (June 30, 2006) 9

In re Estate of Christian, 652 P.2d 1137 (Haw. 1982)..... 4

In re Estate of Cunha, 414 P.2d 925 (Haw. 1966)..... 4

In re Estate of Damon, 128 P.3d 815 (Haw. 2006)..... 5

In re Estate of Damon, 76 Haw. 120 (1994)..... 2

In re Trust Estate of Dwight, 909 P.2d 561 (Haw. 1995).....5, 6, 7

Landgraf v. USI Film Prods., 511 U.S. 244 (1994)..... 9, 11

Lynce v. Mathis, 519 U.S. 433 (1997)..... 9

Mich. Trust Co. v. City of Grand Rapids, 247 N.W. 744 (Mich. 1933)..... 11

Remington v. Metro. Sav. Bank of Balt., 25 A. 666 (Md. 1893)..... 11

Rowlett v. Moore, 96 N.E. 835 (Ill. 1911) 11

Soc'y for the Propagation of the Gospel v. Wheeler, 22 F. Cas. 756 (C.C.D.N.H. 1814) 8

United States v. Schooner Peggy, 5 U.S. (1 Cranch) 103 (1801) 8

United States v. Sec. Indus. Bank, 459 U.S. 70 (1982) 10

STATUTES

28 U.S.C. § 1257(a) 1

RULES

Sup. Ct. R. 10(b) 11

Sup. Ct. R. 10(c) 8

CONSTITUTIONAL PROVISIONS

U.S. Const. Amendment XIV, § 1 1

OTHER AUTHORITIES

Black's Law Dictionary 1181 (8th ed. 2004) 3

Londo H. Brown, *The Testator's Intent – Vague Meanings of Clear Sounding Phrases*, 69 W. Va. L. Rev. 133 (1967) 3

Restatement (Second) of Prop.: Donative Transfers §§ 25.9 & 28.2 (1988) 5

Restatement (Third) of Prop.: Donative Transfers § 2.3 cmt. d (1999) 5

PETITION FOR A WRIT OF CERTIORARI

Petitioner Christopher James Damon Haig respectfully petitions this Court for a writ of certiorari to review the judgment of the Supreme Court of Hawaii in this case.

OPINIONS AND ORDERS BELOW

The opinion of the Supreme Court of Hawaii is reported at 128 P.3d 815. App., *infra*, at 1a-42a. The order denying Petitioner's motion for reconsideration is reported at 132 P.3d 390. App., *infra*, at 74a. The rulings of the state probate court are unpublished. App., *infra*, at 43a-53a; 54a-61a.

JURISDICTION

The Supreme Court of Hawaii filed its opinion on February 16, 2006 and denied Petitioner's timely request for reconsideration on March 9, 2006. On May 26, 2006, Justice Kennedy extended the time within which to file this petition to and including July 7, 2006. No. 05A1097. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION

The Due Process Clause of the Constitution, U.S. Const. Amend. XIV, § 1, provides in relevant part:

> No State shall * * * deprive any person of life, liberty, or property, without due process of law * * *.

STATEMENT OF THE CASE

1. Samuel Mills Damon was born in Honolulu in 1845 to religious missionaries Rev. Samuel Chenery Damon and Julia Sherman (Mills) Damon. At age 27, Mr. Damon – a bank clerk at the Bank of Bishop & Co. – married Harriet Baldwin, and their marriage produced four children. By 1881, he had worked his way up to become a partner at the bank.

Bank founder Charles Reed Bishop met and married Princess Bernice Pauahi in 1850. Some thirty years later, she inherited the vast personal royal lands and treasures of the King Kamehameha dynasty. When Princess Bernice Pauahi

Bishop died (just a year after receiving her inheritance), she bequeathed more than nine thousand acres in the Moanalua Valley to Mr. Damon, who had assisted her in consolidating the Kamehameha lands. He joined her husband as one of the original trustees of her estate charged with establishing a school for boys and a school for girls, a position that Mr. Damon held for approximately 30 years.

Mr. Damon eventually rose to become a prominent banker and government financial advisor in the Hawaiian islands. When Mr. Bishop moved to San Francisco a decade after the death of his wife, Mr. Damon bought out Mr. Bishop's ownership interest and took over the Bank.

When Mr. Damon died in 1924, he left a sizable estate composed principally of real estate and bank stock.[1] (Indeed, until recently, the Damon estate was Hawaii's fourth largest private landowner.) A decade earlier, Mr. Damon had executed a Last Will and Testament. The Damon will placed his substantial holdings in trust and defined in great detail the manner in which Mr. Damon wanted the income from the estate to be distributed to his children and grandchildren while alive.

Mr. Damon also set up a mechanism for the distribution of the corpus – the principal – of the trust upon its termination. He directed the trustees to hold the remaining property "IN TRUST for all of my issue who shall then be living per stirpes and not per capita" following the death of the last to survive of his children and grandchildren in being at his death.[2] App., *infra*, at 36a n.18. He used distinct language to specify that the trust principal be distributed:

---

[1] The Bank of Bishop & Co. later merged with several other banks and with subsequent name changes resulted in the name First Hawaiian Bank.

[2] In 1994, the Supreme Court of Hawaii determined that the trust would terminate upon the death of the last surviving grandchild of Mr. Damon, because constructing the trust as continuing indefinitely would violate the common-law Rule Against Perpetuities. *In re Estate of Damon*, 76 Haw. 120, 126 (1994) (*Damon I*). At that time, the corpus of the trust would be distributed according to the terms of the will. The precise formula for

> (i) to a designated class of individuals ("for all of my issue who shall then be living"); and
>
> (ii) in a specified manner ("per stirpes and not per capita")

Id.

Although his will did not specifically identify the root, or stock generation, of the stirpes, by ordinary rules of construction it is clear that he intended a strict per stirpes distribution of income and a modified per stirpes distribution of corpus at termination. The corpus provision of the will specified only that the corpus should be distributed "on the death of the last survivor of all of my children and grandchildren who shall be living [in 1924]." Because the will explicitly postponed distribution until the death of the last surviving grandchild (and there were no grandchildren born after his death), the great-grandchildren were the earliest possible generation of takers that could have members living at the time of distribution. In this way, he ensured that shares of the residual estate would be divided by the stocks of his great-grandchildren rather than split evenly among all his living descendants.

2. When property is divided on a "per stirpes" basis, property is "proportionally divided between beneficiaries according to their deceased ancestor's share." Black's Law Dictionary 1181 (8th ed. 2004). *See generally* Londo H. Brown, *The Testator's Intent – Vague Meanings of Clear Sounding Phrases*, 69 W. Va. L. Rev. 133, 148 (1967). The precise distribution, however, will depend on which generation of descendants is designated as the so-called "stirpital root." When the testator identifies the "deceased ancestor" by name, it is clear where the first division is to be made. When the testator does not identify the "deceased ancestor," the first division can be made in more than one place and the descendents' re-

---

[Footnote continued from previous page]

distributing the residuary estate "per stirpes" was not discussed in this opinion.

spective shares can vary greatly. For example, if the stirpital root had been set at the level of Mr. Damon's children, this would produce two equal shares, one for the descendants of each of the two Damon children who had issue. If the stirpital root had been set at the level of Mr. Damon's grandchildren, this would produce five shares distributed by right of representation, one for the descendants of each of Mr. Damon's five grandchildren. And, if the stirpital root had been set at the level of Mr. Damon's great-grandchildren, this would produce eighteen shares, one for each of Mr. Damon's living great-grandchildren and one for each great-grandchild who died leaving descendants surviving at termination.

The formulation for determining stirpital distributions under Hawaiian law evolved substantially between 1924, when Mr. Damon died, and 2002, when the probate court issued its amended judgment interpreting his will. The evolution of the law affecting testamentary property is relevant to the interpretation of Mr. Damon's will because "a will speaks from the time of the testator's death, and that what is spoken is subject to the laws in force at that time." *In re Estate of Christian*, 652 P.2d 1137, 1140 (Haw. 1982). Indeed, under the law of Hawaii, "the will of the testator is the law of the case" and "beyond the reach of legislative and judicial action." *Campbell v. Kawananakoa*, 34 Haw. 333, 341, 346 (1937). Thus to interpret the testator's intent – to put oneself in the testator's shoes – one must examine the law the testator is presumed to have known when he drafted his will. *See In re Estate of Cunha*, 414 P.2d 925, 931 (Haw. 1966).

Because by definition, the Restatements are intended to be an "orderly statement of the general common law," the Restatement (First) of Property (1936) – published not long after Mr. Damon's death in 1924 – fairly reflects the state of the law when his will became effective. *See id.* at viii-ix. And a comment to Section 301 of the First Restatement addressed precisely the circumstance posed by the Damon will – the failure to identify the stirpital root. In such cases, the First Restatement provided that "the heads of the respective stirpes are the 'possible takers' who are of the oldest generation in

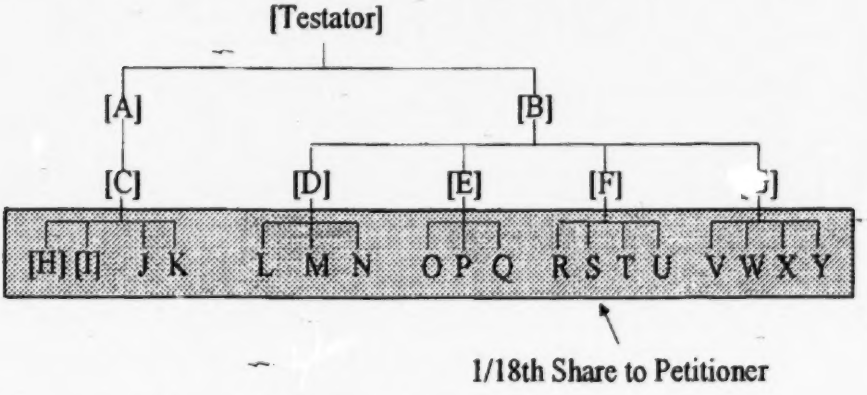
which there is at least one living member at the time when distribution is to be made." Restatement (First) of Property § 301 cmt. h. This method of distribution – looking to the oldest generation in which there is a living member – is known as "modified per stirpes," and it stands in distinction to "strict per stirpes" distributions, which look to the generation nearest to the testator, whether a member of such generation is living or not. The First Restatement taught that when a testator failed to identify the heads of the respective stirps, a modified per stirpes distribution was appropriate.

By the time the Damon trust was nearing termination, the law in Hawaii concerning per stirpes distributions had changed dramatically. In 1995, the Supreme Court of Hawaii decided *In re Trust Estate of Dwight*, 909 P.2d 561 (Haw. 1995), answering what it later called the "Restatement problem," *i.e.*, "whether Hawaii follows the First, Second, or Third Restatement with respect to the meaning of per stirpes." *In re Estate of Damon*, 128 P.3d 815, 826 (Haw. 2006) (*Damon II*). In *Dwight*, the state supreme court adopted the Second Restatement's definition of "per stirpes" as meaning that "the descendants are to take through or as representatives of a parent." *Dwight*, 909 P.2d at 563 (citing Restatement (Second) of Prop.: Donative Transfers §§ 25.9 & 28.2 (1988)). Thus, in Hawaii, since 1995, when a will specifies a per stirpes distribution, the presumption has been that the initial division will be at "the first generation, whether or not there is a survivor." *Id.* at 564 (citing Restatement (Second) of Prop.: Donative Transfers § 28.2 (1988)); *see also* Restatement (Third) of Prop.: Donative Transfers § 2.3 cmt. d (1999) (defining "strict per stirpes" as automatically dividing the estate "into primary shares at the generation nearest to the decedent (i.e., at the children generation)"). Essentially, the state supreme court changed the default rule to strict per stirpes distribution.

3. On April 8, 1998, Michael E. Haig, one of Mr. Damon's great-grandchildren and Petitioner's brother, filed a petition in the probate court seeking an interpretation of the Damon trust's corpus per stirpes distribution provision. Mr.

Haig, Petitioner, and other descendants argued that the will had to be interpreted according to the law of Hawaii as it stood in 1924. That iteration of the law, they argued, required a modified per stirpes distribution in accordance with the First Restatement. And under a modified per stirpes distribution, because the will postponed corpus distribution until the death of the last surviving grandchild in being and did not otherwise identify the root generation, the stirpital root should be set at the level of great-grandchildren. Thus, Mr. Haig, Petitioner and certain other descendents advocated a distribution whereby each great-grandchild of Samuel Damon would be entitled to 5.55 percent of the residuary estate, as illustrated below:

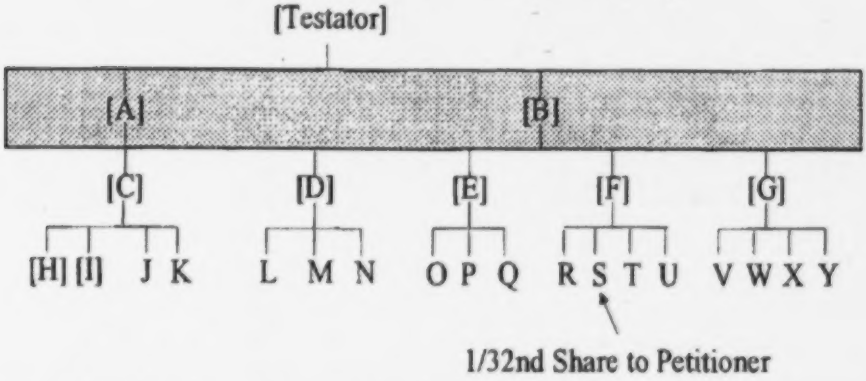
Modified Per Stirpes Distribution



[Brackets indicate deceased with issue]

Another group of descendents argued that the Supreme Court of Hawaii's decision in *Dwight* was controlling, and commanded a strict per stirpes distribution. Under a strict per stripes distribution, the stirpital root would be set at the level of Mr. Damon's children, resulting in a distribution of half of the residuary estate to the descendents of Samuel E. Damon, who had four grandchildren, and half to the descendents of Henry Fowler Damon, who had fourteen. Under this construction, Petitioner's share in the residuary estate would be reduced from 5.55 percent, to 3.125 percent, as illustrated below:

Strict Per Stirpes Distribution



[Brackets indicate deceased with issue]

Relying on the 1995 decision of the Supreme Court of Hawaii in *Dwight*, the probate court ruled that a strict per stirpes construction was appropriate. App., *infra*, at 49a-52a.

Michael Haig, Petitioner, and the other grandchildren of Henry Fowler Damon appealed to the Supreme Court of Hawaii arguing that the probate court erred in applying a strict per stirpes interpretation to the will. Petitioner objected specifically to the probate court's retroactive application of the 1995 rule of *Dwight* to a will the court was bound to construe according to the law of 1924. App., *infra*, at 65a.

The Supreme Court of Hawaii affirmed, placing principal reliance on the *Dwight* decision, which it viewed as controlling notwithstanding the fact that the Damon will became effective seven decades before. App., *infra*, at 27a. The state supreme court did not address Petitioner's argument that it was unlawful for the court to retroactively apply a new rule to divest Petitioner of rights in property he had held since birth.

Petitioner sought reconsideration before the state supreme court, raising his argument that the state courts' retroactive application of a rule created in 1995 to a will that became effective in 1924 had reduced his vested interest in property (from one-eighteenth to one-thirty-second of the residuary estate) and had therefore violated his rights to due process under the U.S. Constitution. App., *infra*, at 69a-73a.

The Supreme Court of Hawaii again rejected Petitioner's federal law argument. App., *infra*, at 74a-75a.

This petition follows.

REASONS FOR GRANTING THE PETITION

Under the corpus provision of the Damon will, from the time of his birth, Petitioner held vested rights in the residuary estate of his great-grandfather. This property interest was established in 1924 under the laws of Hawaii then in force. The Supreme Court of Hawaii retroactively applied new law (formulated no earlier than 1995) to reduce Petitioner's vested interest by 44 percent, rejecting Petitioner's arguments that doing so violated his rights under the Due Process Clause of the Fourteenth Amendment. That ruling conflicts with several of this Court's decisions concerning retroactive application of law. This Court's review is accordingly warranted. *See* Sup. Ct. R. 10(c).

The Decision Of The Supreme Court Of Hawaii Conflicts With Several Decisions Of This Court Concerning Retroactive Application Of Law.

While riding Circuit, Justice Story famously noted, "every statute, which takes away or impairs vested rights acquired under existing laws . . . must be deemed retrospective." *Soc'y for the Propagation of the Gospel v. Wheeler*, 22 F. Cas. 756, 767 (C.C.D.N.H. 1814). And from its earliest days, this Court has been extremely reluctant to give retroactive effect to statutes affecting the private rights of parties absent a clear statement of legislative intent. *See, e.g., United States v. Schooner Peggy*, 5 U.S. (1 Cranch) 103, 110 (1801) (Marshall, C.J.) (in "private cases between individuals, a court will and ought to struggle hard against a construction which will, by a retrospective operation, affect the rights of parties"); *Auffm'ordt v. Rasin*, 102 U.S. 620, 622 (1880) ("no law will be construed to act retrospectively unless its language imperatively requires such a construction").

This "presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doc-

trine centuries older than our Republic." *Landgraf v. USI Film Prods.*, 511 U.S. 244, 265 (1994); *see also Hamdan v. Rumsfeld*, 548 U.S.__, slip op. at 11 (June 30, 2006) (noting the "presumption against retroactivity" that applies to new legislation). In conjunction with these deep roots, "the antiretroactivity principle finds expression in several provisions of our Constitution," including the Due Process Clause. *Landgraf*, 511 U.S. at 266.

The principle applies with particular force in the area of "property rights," where "predictability and stability are of prime importance." *Id.* at 271; *see also id.* at 271 n.25 (citing cases). *See also Dunn v. Micco*, 106 F.2d 356, 359 (10th Cir. 1939) ("The rule stare decisis applies with peculiar force and strictness to decisions which have established a rule of property. . . . The reasons are obvious. Property is acquired and sold in reliance on such rules."). Retroactive application of the laws "'compromise[s]'" "'the interests in fair notice and repose'" that are essential to any functioning system of private property and that the "'Due Process Clause . . . protects'". *Lynce v. Mathis*, 519 U.S. 433, 440 n.12 (1997) (quoting *Landgraf*, 511 U.S. at 244). Accordingly, this Court has generally refused to apply statutes retroactively where such application would deprive persons of vested property interests.

For example, in *Landgraf*, the Court refused to apply a new damages remedy under Title VII to cases pending before the new remedy's enactment. *See* 511 U.S. at 286. The Court reasoned that "substantially increasing the monetary liability of a private party" through retroactive application of a statute threatened to "sweep away settled expectations suddenly and without individualized consideration." *Id.* at 266, 284.

Similarly, in the earlier case of *Auffm'ordt*, this Court declined to apply retroactively an amendment to the bankruptcy laws that reduced the period for voidable transfers from four-months to two months where the result would be to foreclose a creditor's claim against the transferee. *See* 102 U.S. at 622. The Court recognized that retroactive application of the stat-

ute would effectively "destroy a vested right of property." *Id.* Consistent with the dictates of the Due Process Clause, the Court avoided that unfair result, holding that "where the rights of parties had been fixed under the old law," the case should be "governed by its provisions." *Id.*; *see also United States v. Sec. Indus. Bank*, 459 U.S. 70, 82 (1982) (declining to apply retroactively new bankruptcy rules to pre-existing liens, concluding retroactive application likely would violate the Takings Clause).

Retroactive application of newly crafted common-law rules poses no less of a threat to vested property rights than retroactive legislation. *See Dunn*, 106 F.2d at 359 (recognizing that a judicial "departure from an established rule of property may destroy important rights or titles acquired on the faith thereof"). Thus, where a rule has been changed by judicial fiat rather than legislative enactment, this Court has not hesitated to protect rights under the Due Process Clause by prohibiting retroactive application of the new judicially-created rule.

In *Bouie v. City of Columbia*, 378 U.S. 347 (1964), for example, this Court reversed – on due process grounds – a conviction based on the South Carolina Supreme Court's retroactive application of its new interpretation of the state's trespassing statute. *Id.* at 362. The Court held that by applying a 1961 construction of the State's trespassing law to acts that occurred in 1960, "the South Carolina Supreme Court . . . deprived petitioners of rights guaranteed to them by the Due Process Clause." *Id.* While the new construction was "of course valid for the future, it [could] not be applied retroactively, any more than a legislative enactment [could] be." *Id.*

By permitting retroactive application of new law to divest persons of their rights in property, the Supreme Court of Hawaii applied a due process rule that cannot possibly be reconciled with the decisions of this Court described above. The Supreme Court of Hawaii retroactively applied a rule that was created no earlier than 1995 to a will that became effective in

1924. For Petitioner, the consequences of that retroactive application are severe – slashing his vested interest in the residuary estate nearly by half. Left undisturbed, the actions of the state court here certainly will "destroy a vested right of property," *Auffm'ordt*, 102 U.S. at 622, and "sweep away" Petitioner's "settled expectations suddenly and without individualized consideration." *Landgraf*, 511 U.S. at 284. And *Bouie* makes clear that the Due Process Clause does not permit a judicial rule to "be applied retroactively, any more than a legislative enactment [could] be." 378 U.S. at 362. The Supreme Court of Hawaii disregarded these decisions, and this Court's review is accordingly warranted.[3]

---

[3] The judgment of the Supreme Court of Hawaii also conflicts with the decisions of several other state courts of last resort that, in the context of wills, held that due process principles prohibited retroactive application of new legal principles to revise vested property rights. *See, e.g., Rowlett v. Moore*, 96 N.E. 835, 837 (Ill. 1911) ("To construe the act in question so as to give it a retroactive effect would, in effect, be to recognize the power of the Legislature to deprive persons of property rights without due process of law, which the Constitution forbids."); *Remington v. Metro. Sav. Bank of Balt.*, 25 A. 666, 667 (Md. 1893) ("by [the death of the testator] the estate of the distributees became vested and absolute, and could not be divested by any subsequent legislation, because it would divest vested rights"); *Mich. Trust Co. v. City of Grand Rapids*, 247 N.W. 744, 747 (Mich. 1933). The Supreme Court of Hawaii has thus set itself against the tide of state court interpretations of this important principle of federal law, and that conflict is an independent basis for the exercise of this Court's certiorari jurisdiction. *See* Sup. Ct. R. 10(b).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

THEODORE B. OLSON
Counsel of Record
MATTHEW D. MCGILL
KRISTINA MARLOW
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, NW
Washington, DC 20036-5306
(202) 955-8500

Counsel for Petitioner

July 7, 2006